Paari a/l Perumal v Abdul Majid Hj Nazardin & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–11–71 OF 1999
FAIZA TAMBY CHIK J
10 JULY 2000

Labour Law — *Employment — Probationer — Whether confirmed employee — Entitlement to increment upon confirmation — Employee given annual leave — Bare denial of dissatisfaction with employee's performance — Whether employee deemed confirmed at the end of probationary period*

The plaintiff commenced employment with the defendant as a litigation clerk on 2 February 1994 at a salary of RM1,100 per month. The probation period was three months. The plaintiff was entitled to annual leave provided his position was confirmed. He was given annual leave. The plaintiff left the defendant's employment at the end of January 1995. The plaintiff claimed against the defendant for damages for breach of contract due to the defendant's failure to pay the increment of RM100 after the end of the probation on 30 April 1994. The defendant contended that the said leave were given upon humanitarian grounds and therefore were not to be taken as annual leave. The magistrate dismissed the plaintiff's claim on the ground that the plaintiff was a probationer and therefore the respondent need not pay him the increment. The magistrate had presumed that the plaintiff's application for annual leave was a labour tactic to defeat the defendant by trapping them. The plaintiff appealed.

Held, allowing the appeal:

(1) Where the employers gave the employee some benefit which they were only entitled to after being confirmed, the benefits given meant that the employees have been treated as confirmed. Thus, in the present case giving the plaintiff the annual leave proved that he was a confirmed employee (see p 607H).

(2) The magistrate erred when she accepted the evidence that the plaintiff had not been confirmed in his position because the defendant was dissatisfied with the plaintiff's performance. It was clearly a defence of bare denial. The fact that the defendant was dissatisfied with the plaintiff's performance was no where to be found in the defence. It was adduced for the first time during trial. In those 12 months of employment, the plaintiff did not receive any letters warning him of any purported unsatisfactory performance. The absence of warning letters support the plaintiff's submission that these allegations regarding his poor and unsatisfactory performance were mere afterthoughts of the defendant. The magistrate should have rejected this evidence (see pp 607I–608A, D).

(3) The magistrate had erred in deciding that the register kept by the employer pursuant to s 61 of the Employment Act 1955 was not relevant. The different wage rates before and after the probation period entered in the register would certainly be evidence of confirmation. The defendant's failure to produce to court the register in the possession of the defendant ought to have triggered the raising of adverse inference against the defendant pursuant to s 114(g) of the Evidence Act 1950. The irresistible inference would be that the register if produced would be unfavourable to the defendant. The magistrate had erred when she failed to invoke s 114(g) of the Evidence Act 1950 (see p 608E, F–H).

(4) A probationer who is taken into the permanent service should be advised of it by written notice served within one week of the completion of the probationary period. But if the employee is neither confirmed nor terminated at the end of his probationary period, it should be deemed to be a confirmed employee (see p 613G).

(5) Due to the present climate of industrial relation and economic growth in Malaysia, this would be an appropriate occasion to consciously depart from the offending principle that if no action has been taken by way of confirmation or by way of termination at the end of the probationary period, the employee continues to be in service as a probationer. There is a need today in Malaysia for the court to adopt a proactive stand in order to create a win-win situation for both employers and employees (see pp 612H, 615D, 616B).

[Bahasa Malaysia summary

Plaintif telah memulakan pekerjaan dengan defendan sebagai seorang kerani litigasi pada 2 Februari 1994 dengan gaji sebanyak RM1,100 sebulan. Tempoh percubaan adalah selama 3 bulan. Plaintif berhak mendapat cuti tahunan jika jawatan beliau disahkan. Beliau telah diberikan cuti tahunan. Plaintif telah berhenti daripada perkhidmatan defendan pada penghujung bulan Januari 1995. Plaintif menuntut terhadap defendan untuk gantirugi kerana kemungkiran kontrak disebabkan kegagalan defendan untuk membayar kenaikan gaji sebanyak RM100 selepas tamat tempoh percubaan pada 30 April 1994. Defendan menegaskan bahawa cuti tersebut telah diberikan atas alasan peri kemanusiaan dan dengan itu tidak seharusnya dianggap sebagai cuti tahunan. Majistret telah menolak tuntutan plaintif atas alasan bahawa plaintif adalah seorang pegawai dalam percubaan dan oleh itu responden tidak perlu membayar beliau kenaikan tersebut. Majistret tersebut telah membuat anggapan bahawa permohonan plaintif untuk cuti tahunan adalah merupakan satu taktik kerja untuk mengalahkan defendan dengan memerangkapnya. Plaintif telah merayu.

Diputuskan, membenarkan rayuan tersebut: A

(1) Di mana majikan memberikan pekerja manfaat kepada yang mana mereka hanya berhak selepas disahkan dalam jawatan, manfaat yang diberikan itu bermakna bahawa pekerja-pekerja tersebut telah disifatkan sebagai telah disahkan dalam jawatan. Oleh itu, dalam kes semasa ini, memberikan cuti tahunan kepada pekerja B tersebut membuktikan bahawa beliau merupakan seorang pekerja yang telah disahkan dalam jawatan (lihat ms 607H).

(2) Majistret tersebut tersalah pertimbangan apabila beliau menerima keterangan bahawa plaintif masih belum disahkan dalam jawatan beliau kerana defendan tidak berpuashati dengan prestasi plaintif. C Ianya jelas merupakan pembelaan penafian kosong belaka. Hakikat bahawa defendan tidak berpuashati dengan prestasi plaintif tidak terdapat sama sekali dalam pembelaan tersebut. Ianya telah dikemukakan buat pertama kalinya di perbicaraan. Dalam tempoh pekerjaan selama 12 bulan itu, plaintif telah tidak menerima apa-apa surat yang memberi amaran kepada beliau D mengenai prestasi yang dikatakan tidak memuaskan itu. Ketiadaan surat amaran menyokong hujahan plaintif bahawa dakwaan-dakwaan ini mengenai prestasi beliau yang tidak baik dan memuaskan itu adalah hanya perkara yang difikirkan kemudian oleh defendan. Majistret tersebut seharusnya menolak keterangan ini (lihat ms 607I–608A, D). E

(3) Majistret tersebut telah tersalah pertimbangan dalam memutuskan bahawa daftar yang disimpan oleh pekerja tersebut yang selaras dengan s 61 Akta Pekerjaan 1955 adalah tidak relevan. Kadar gaji berlainan sebelum dan selepas tempoh percubaan dalam daftar tersebut pastinya akan menjadi bukti F pengesahan. Kegagalan defendan untuk mengemukakan kepada mahkamah daftar tersebut yang berada dalam simpanan defendan seharusnya menyebabkan berbangkitnya inferens bertentangan terhadap defendan selaras dengan s 114(g) Akta Keterangan 1950. Inferens yang tidak boleh dielak adalah bahawa jika daftar tersebut dikemukakan, ia tidak akan memihak kepada defendan. G Majistret tersebut telah tersalah pertimbangan bila mana beliau gagal untuk menggunakan s 114(g) Akta Keterangan 1950 (lihat ms 608E, F–H).

(4) Seseorang pegawai dalam percubaan yang diberikan perkhidmatan tetap seharusnya dimaklumkan mengenainya H melalui notis bertulis yang disampaikan dalam tempoh satu minggu daripada tamatnya tempoh percubaan. Tetapi jika pekerja tersebut tidak disahkan dalam jawatan mahupun ditamatkan perkhidmatannya ketika tamat tempoh percubaan, ia haruslah dianggap sebagai pekerja yang telah disahkan dalam jawatan (lihat ms 613G). I

(5) Disebabkan keadaan semasa perhubungan perindustrian dan ketumbuhan ekonomi di Malaysia, ini akan merupakan keadaan

yang wajar untuk sengaja keluar daripada prinsip yang menyalahi bahawa jika tiada tindakan diambil untuk pengesahan jawatan atau penamatan ketika tamatnya tempoh percubaan, pekerja tersebut terus berkhidmat sebagai pegawai dalam percubaan. Adalah perlu kini di Malaysia untuk mahkamah menerima-pakai suatu pendirian yang proaktif bagi mewujudkan situasi saling menang bagi kedua-duanya majikan dan pekerja-pekerja (lihat ms 612H, 615D, 616B).]

Notes

For cases on probationer, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 818–821.

Cases referred to

Chan Yoke Lain (adminstrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303 (refd)
Chiu Wing Wa & Ors v Ong Beng Cheng [1994] 1 MLJ 89 (refd)
Express Newspapers (P) Ltd v Labour Court AIR 1964 SC 806 (refd)
Healthcare Medical Screening Centre (M) Sdn Bhd v Raymund Dominic Ignatius Louis [1997] 3 ILR 879 (refd)
Kanagasabai Satkuru v United Malayan Banking Corp Bhd [1981] 2 MLJ 23 (refd)
KC Mathews v Kumpulan Guthrie Sdn Bhd [1981] 2 MLJ 320 (refd)
Lum Sow Kuen v Chuah Choong Heong & Ors [1998] 4 AMR 3518 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265 (refd)
Trio-Kenwood Electronics Engineering (M) Sdn Bhd v Syed Ahmed Syed Mohsin [1996] 2 ILR 669 (refd)
V Subramaniam & Ors v Craigielea Estate [1982] 1 MLJ 317 (refd)

Legislation referred to

Employment Act 1955 s 61
Employment Regulations 1957 ss 5, (b)(3), (c)
Evidence Act 1950 s 114(g)

Appeal from: Summons No 72–6270 of 1995 (Magistrate's Court, Kuala Lumpur)

Paari a/l Perumal representing himself as appellant.
Faradina bte Abu Bakar (*Akbardin & Co*) for the respondent.

Faiza Tamby Chik J: The claim at the magistrate's court was, inter alia, for damages for breach of contract due to the defendants failure to pay the

increment of RM100 after the end of the probation on 30 April 1994 (see statememt of claim at p 7 rekod rayuan). The learned magistrate dismissed the claim with costs. The learned magistrate dismissed the claim on the ground that the plaintiff was a probationer and therefore the respondents need not pay him the increment in salary of RM100 commencing May 1994. The magistrate's court found only one issue to be determined, ie whether or not the plaintiff was a confirmed staff of the defendants (see grounds of judgment at p 108 rekod rayuan, at line 2: 'Isu di dalam kes ini adalah samada plaintif telah disahkan di dalam jawatan atau tidak'. Again at line 9 of p 111 rekod rayuan, the learned magisrate says 'Isu dalam kes ini adalah samada plaintif telah disahkan atau tidak').

The salient points of the case are that the defendants carry on a legal practice in the name and style of Messrs Majid & Chen with a branch in Kuala Lumpur. The plaintiff commenced employment with the defendants as a litigation clerk on 2 February 1994 at a salary of RM1,100 per month. The probation period was three months. The plaintiff was entitled to annual leave provided his position was confirmed. He was given annual leave. He was not paid RM100 increment. He was not issued with any warning letters while in the defendant's employment. He left the defendant's employment at the end of January 1995.

The letter of appointment is at p 22 rekod rayuan which stipulated that the probation period was for three months and that the plaintiff was entitled to annual leave only as a confirmed employee. He commenced employment on 2 February 1994. The three months probation period ended on 30 April 1994. Pages 24 to 31 rekod rayuan are agreed documents whereby the plaintiff's leave were approved and granted according to the letter of appointment (see p 22 rekod rayuan). DW admitted them in his testimony.

The defendants contended that the said leave were given upon humanitarian grounds and therefore were not to be taken as annual leave. The plaintiff contended that all the leave were granted in accordance with his letter of appointment. The plaintiff further contended that if the defendants really wanted to give him the leave on humanitarian grounds and not as annual leave, they could and should have stated so on all his leave application forms. At pp 27 and 30 of the rekod rayuan it is evident that the leave were approved and stated as annual leave only. It is clear that the granting of annual leave proved that the plaintiff was a confirmed employee. In *Healthcare Medical Screening Centre (M) Sdn Bhd v Raymund Dominic Ignatius Louis* [1997] 3 ILR 879, the Industrial Court held:

> The fact that the claimant had paid a commission instead of a training allowance in April shows that he had been confirmed. This substantiated his contention that the payment of the commission begins on the ending of the probationary period with the stopping of the training allowance. The company had paid the claimant one month's salary instead of a pro-rated weekly sum as compensation *in lieu* of the notice and points to a confirmation.

In *Trio-Kenwood Electronics Engineering (M) Sdn Bhd v Syed Ahmed Syed Mohsin* [1996] 2 ILR 669, the Industrial Court stated at pp 674–675:

A The claimant was on probation as stated earlier but before the end of his probationary period he was given RM300 as merit increment. In *Oxford Advanced Learner's Dictionary of Current English*, 'Merit' means:

> 'Quality of fact of deserving well, worth, excellence ... quality, fact, action, etc that deserves reward.'

B Therefore it was not at all convincing as said by the company that the claimant was given merit increment effective 1 July 1994 due to the fact that other managers in other companies in similar position received more or because of market condition. It was the court's opinion that merit increment was given because the company was satisfied with the claimant's work and there was no evidence from the company that it had ever complained of his performance. If the company wanted to give the claimant for other purpose such as bonus C which was at the discretion of the company or for other useful purpose why did the company used the word 'merit increment'.

There were other methods for the company to sue. *From Employment, Its Terms and Conditions* by BR Gaiye and Mrs. Nirmala Malhotra, it was said:

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> 'When increment was given which was not ordinarily given till a person satisfactorily completed the probation period then he is deemed to have been confirmed on expiry of the period of probation if he is not discharged.'

At the end of his probation of three (3) months the claimant was not E discharged and as such it is the court's opinion that the claimant was confirmed in his employment and therefore regarded as a confirmed employee when he was dismissed. This was fortified that when he was dismissed he was paid two months salary instead of two (2) weeks if considered on probation as provided in his employment letter dated 8 March 1994 p 4 in CO1 which stated:

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> *Termination*
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> During the probation or extended probation period, a two (2) weeks' notice shall be given by the employee or the company without giving any reason. Upon confirmation, either party shall give two (2) months' notice or salary in lieu of notice without any reason.

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> The company told the court that it was on sympathetic grounds why it gave two (2) months salary. It this was so why the company did not give one (1) month or three (3) or four (4) months and why two (2) months which conformed to the provision in the said letter of appointment as a confirmed employee. It was considered that the company had already treated the claimant as a confirmed employee but later as an after thought said otherwise on sympathy.'

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In both these cases, the employers gave the employee some benefit which they were only entitled to after being confirmed. These benefits when given meant the employees have been treated as confirmed. Therefore, giving the plaintiff the annual leave proved that he was a confirmed employee.

The learned magistrate in the instant case had taken into consideration I DW's evidence in respect of matters not pleaded in the statement of defence. Reference is made to the last paragraph at p 109 rekod rayuan. The learned magistrate erred when she accepted the evidence of DW, ie 'SD

tidak pernah sekali-kali mengesahkan plaintif di dalam jawatan beliau kerana tidak berpuashati dengan prestasi kerja plaintif.' Reference is made to the statement of defence at p 15 rekod rayuan when upon perusal, it is clearly a defence of bare denial. The fact that the defendants were dissatisfied with the plaintiff's performance was no where to be found in the defence. It was adduced for the first time during trial. This evidence should have been rejected by the learned magistrate. In a Federal Court case of *Kanagasabai Satkuru v United Malayan Banking Corp Bhd* [1981] 2 MLJ 23 at p 24, Tun Abdul Hamid FJ (as he then was) said:

> First and foremost the question that must necessarily be considered is whether the question raised by the appellant was an issue disclosed by the pleadings. It is a cardinal principle of law that a judge is bound to decide a case on the issues on the record (see *Hj Mohd Dom v Sakiman*).
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> The question therefore is whether the appellant specifically and distinctly pleaded in his statement of defence the point which he now desires to raise.

It was not disputed that the plaintiff was not issued with any warning letters stating his performance was unsatisfactory. He commenced employment on 2 February 1994 and left at the end of January 1995. There were all in 12 months. It is observed that in those 12 months of employment, he did not receive any letters warning him of any purported unsatisfactory performance. The absence of warning letters support the plaintiff's submission that these allegations regarding his poor and unsatisfactory performance were 'mere afterthoughts' of the defendants.

The learned magistrate decided that the register kept by the employer pursuant to s 61 of the Employment Act 1955 was not relevant (see last paragraph at p 111 rekod rayuan). Obviously, the learned magistrate had fallen into error. Section 5 of the Employment Regulations 1957 ('the Regulations') refers to the register to be kept by every employer. Section 5(b)(3) mentioned of wage rates and s 5(c) mentioned of details of wages and allowances earned during each wage period and the particulars under para (c) shall be brought up to date in the register. If perused carefully, the different wage rates before and after the probation period entered in the register would certainly be evidence of confirmation. Thus, I am of the opinion that the register was proven to be relevant to the issue of determining if any employee was confirmed. It is observed that during trial, DW failed to produce the employees register adverted to earlier. During cross examination at p 81 rekod rayuan, DW answered that he did not bring it to court. DW further failed to give any explanation as to his failure to do so. DW's failure to produce to court the register in the possession of the defendants ought to have triggered the raising of adverse inference against the defendants pursuant to s 114(g) of the Evidence Act 1950. What were the defendants afraid of? The irresistible inference would be that the register if produced would be unfavourable to the defendants. The learned magistrate had erred when she failed to invoke s 114(g) of the Evidence Act 1950. In *Chan Yoke Lain (adminstrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303 the Court of Appeal held:

(2) The presence of David Lim or his clerk who filled up the proposal forms would have cleared all doubt about the alleged non-signature of the deceased on D2. Not only was David Lim or his clerk not called, neither was any explanation given by the respondent company as to the non-availability of David Lim or his clerk. The irresistible inference would be that if David Lim or his clerk were called, their evidence would be unfavourable to the respondent. The judge had erred when he declined to consider and invoke s 114(g) of the Evidence Act 1950 (see pp 308F–H and 309D).

The learned magistrate had presumed the plaintiff's application for annual leave was a labour tactic to defeat the defendant by trapping them (see p 110 rekod rayuan). The learned magistrate's failed to appreciate the fact that the defendants are practising lawyers. What is the probability of the plaintiff trapping and defeating the defendants who have legal training and learned in law. The learned magistrate also failed to consider the evidence of DW himself when he admitted at p 86 rekod rayuan that the defendants were waiting for the plaintiff to resign. Why wait for the plaintiff to resign? Why did they not terminate his services if he was still on probation? In all probabilities the answer is that the defendants did not have any valid reasons to terminate the plaintiff's service as he was already confirmed. So the defendants employed the tactic of not paying his salary increment of RM100 per month in order to force his resignation.

In the Court of Appeal's case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, the court stated at pp 398–399:

> Compelled to choose between these two conflicting versions, the learned trial judge preferred Samy's version and found that the plaintiff, in defiance of orders, had voluntarily climbed the tree on his own accord and was therefore not entitled to recover.
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> We are fully conscious that this is an appeal that turns upon a question of fact. However, a careful reading of the trial judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the defence witnesses is based upon a wrong premise and does not accord with a well-settled principle that goes to form the fulcrum upon which the scales of procedural justice turn.
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> First, the trial judge appears to have completely overlooked the inherent probabilities of the case. Evidence was led to prove that the plaintiff was a person who had a history of following orders given to him by those who held him in their custody, including the first respondent. Indeed the plaintiff testified, without challenge, of the dire consequences that would ensue from disobedience. All this evidence was entirely accepted by the defendants. Yet, the defendants' case was that on this occasion the plaintiff had wilfully disobeyed an express order given to him. The question which the trial judge ought to have asked himself is whether it was inherently probable that the plaintiff, on this isolated instance, would have dared disobey an express order given to him not to climb the tree. Had he done so, he would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.
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> So, here we have a case where there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him. And

of the principles that should govern such a case as the present there is no doubt.

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

In the case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* (1942) 73 Lloyd LR 217:

> 'The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. [Which, we hasten to add, is not the case here.] I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. *If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view* — in these mundane happenings there is no conclusive argument than *non est credendum quia impossible. If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.*'

If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed.

The question which the learned magistrate should have asked herself was whether it was inherently probable that the plaintiff had used the labour tactic of trapping the defendants by deceiving them into giving him the annual leave. The learned magistrate further should have asked herself whether it was logical for the defendants to wait and hope for the plaintiff to resign without any reason to do so. The right to livelihood is a right guaranteed by the Federal Constitution. Had the learned magistrate asked herself the above questions, she would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

It is noteworthy that on p 57 of the rekod rayuan from para 18 to para 24 the plaintiff had given extensive evidence as to damages suffered by him. It is observed that on p 73 rekod rayuan the defendants had not challenged this piece of evidence during his cross-examination. Therefore it must be accepted as trite that failure to cross-examine the plaintiff on this piece of evidence must be treated as acceptance of this part of the plaintiff's evidence by the defendants. In *Lum Sow Kuen v Chuah Choong Heong & Ors* [1998] 4 AMR 3518, Kamalanathan Ratnam J said at p 3531:

> The rule in *Browne v Dunn* has been explained by Mukharji J in *Carapiet v Derderian* AIR 1961 Cal 359 at p 363:

> 'The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he ask no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.'

This principle has been accepted by our Court of Appeal in *Aik Ming (M) Sdn Bhd v Chang Chin Chuen* [1995] 3 AMR 2375 at pp 2406–2407 and in *Sivalingam v Periasamy* [1996] 3 AMR 3507 at p 3513.

In the circumstances of the instant case and for the foregoing reasons, I allow the appeal with cost and order the defendants to pay damages to the plaintiff as follows: Increment of RM100 per month for nine months from May 1994 to January 1995 amounting to RM900, ie from date of confirmation (1 May 1994) to date of leaving employment. Salary of RM1,200 per month for the month of February and March of 1995 and RM700 per month from April 1995 to May 1996 amounting to RM12,200 (after taking into account of RM500 per month in mitigation). The plaintiff found a full time job in June 1996.

I would like to make an important observation here. This appeal brings out a very important point of law with regard to the principle of probation due to its significance to employees generally in this country. The main issue here is not a security of tenure but rather the status of the employee after passing the date of probation, ie the employee continuing to be a probationer as opposed to being confirmed. The law on probation in Malaysia as it stands today is as stated by the Indian case of *Express Newspapers (P) Ltd v Labour Court* AIR 1964 SC 806 which held:

> An employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. Without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired — except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or way of termination, the employee continues to be in service as a probationer. There cannot be

automatic termination of services of the employee after the expiry of the period of six months. A

This case was followed by our Federal Court in the cases of *KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320 (FC) and *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317 (FC). In *KC Mathews*, the Federal Court held at p 321: B

> In so far as his claim of confirmed service was concerned, counsel for the respondent relied on the following passage from the judgment of Das Gupta J, in *Express Newspapers Ltd v Labour Court & Anor*:
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> > 'This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired — except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.' C D E
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> With respect, we agree.
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> For these reasons we dismissed the appeal with costs.
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> Appeal dismissed.

In *V Subramaniam & Ors* the Federal Court said at p 319:

> On the first subsidiary issue the Industrial Court was of the opinion that a probationer who at the end of his probationary period has not been confirmed or told to go must be regarded as having been admitted into permanent service, following its own earlier decision in Award 4 of 1970 (presided over by the late Mr MacIntyre). In our judgment this was erroneous, for as was stated by the Indian Supreme Court at p 807 in *Express Newspapers (P) Ltd v Labour Court*: F G
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> > 'There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had neither been terminated or confirmed.'

The point of contention here is if no action has been taken by way of confirmation or by way of termination at the end of the first probationary period, the employee continues to be in service as a probationer. This is the offending principle. I am of the view that the offending principle is neither supported by case law nor by logical reasoning. It is of interest to note that in the Industrial Court Award No 15/75 (Craigeilea Estate and 4 Employees) the court said: H I

> 7.3 We think the continuance in employment of a probationer after the completion of the probationary period is by itself sufficient notice of

induction into permanent service; and the right of a probationer to join a Union is not negotiable since he is a workman within the meaning of the provisions of the Act.

The court is aware of the fact that neither of the above is a binding precedent but certainly more regard must be had to the views of the learned President, sitting here and making an award in the context of conditions peculiar to this country. Also, it appears to be a more logical conclusion to me to. The court thinks it is incumbent on the Estate to inform the trainee, at the end of the training period, as to whether his appointment has become permanent and, if not, to give him notice of termination so that he can seek employment elsewhere, perhaps in other fields. On the reasoning of the above Indian decision, there would be an indefinite period of probation after the due date of confirmation had elapsed which, the court thinks, may not be fair to the probationer who should know exactly where he stands. The court agrees, therefore, with the finding of the learned President in Ward No 4/70.

But in Award No 4/70 made in Industrial Court Case No 15 of 1968, the learned President had this to say:

> 7.2The compromise, however, does not appear to cover two issues raised by virtue of the Union's claim that a probationer who is taken into the permanent service should be advised of it by written notice serviced within one week of the completion of the probationary period; and by virtue of the Company's assumption that a probationer is exempted from the scope of Union representation.'

I am of the opinion that the security of tenure of a worker is of vital importance because of the workers' role in national development. A happy employee is a satisfied worker. A satisfied worker is one who knows exactly when his probation period is on trial and when he is confirmed. Languishing an employee as a probationer for an indefinite period does nobody any good. It is not productive for the employer nor for the employee himself. It is in this light that the offending principle is no longer in keeping with national aspiration and development if our nation is to aspire to achieve the status of an industrialised nation by the year 2020. Industrial harmony is a prerequisite. Only with security and continuity of employment will there be increased productivity. A probationer who is taken into the permanent service should be advised of it by written notice served within one week of the completion of the probationary period. But if the employee is neither confirmed nor terminated at the end of his probationary period, it should be deemed to be a confirmed employee. This will bring about certainty of status of employment to the employee. And automatically the employee concerned will then be entitled to all the benefits that come along with confirmation. This will definitely bring about increased productivity as an employee is a happy and satisfied person. Further employees will not easily fall prey to unscrupulous employer who keep their employees languishing in the probation period and avoiding the need to give them the benefits which they will have to give if they are confirmed.

Before I conclude there is another observation. I am mindful of the fact that the two Federal Court cases are binding upon this court. Nevertheless with respect I am of the opinion that this court is entitled to make its own

decision without breaching the principle of stare decisis. In the Supreme Court case of *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89 at p 96, Mohd Azmi SCJ said:

> ... Without any intention of undermining the principle of stare decisis as laid down by Lord Scarman in *Duport Steel Ltd v Sirs* (1980) 1 529 AT 551 (C), it is important that decided cases should not be followed blindly. As stated by Lord Halbury in *Quinn v Leathem* [1901] AC 495 at p 506:
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> > 'Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found.'

In the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 184, Eusoff Chin Chief Justice said:

> Employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring out the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to immense hardship, suffering and exorbitant expenses. In a classic judgment in *Bharat Singh v New Delhi Tuberculosis Centre* (1986) 25 CC 614 at p 619; AIR 1986 SC 842, the Indian Supreme Court held:
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> > 'Instances are legend where workmen have been dragged by Employers in endless litigation with preliminary objections and other technical pleas to tire them out. A fight between a workman and his employer is often times an unequal fight. The legislature was thus aware that because of the long pendency of disputes in tribunals and courts, on account of the dilatory tactics adopted by the Employer, workmen had suffered.'
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> Our Parliament must have been aware of this problem and had especially enacted s 30(3) of the Act which requires the Industrial Court to make its Award without delay and where practicable within 30 days. But here the claimant has been without a job for seven years, and the object and spirit of the Act to have industrial disputes speedily resolved in the national interests have been defeated and frustrated.
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> Lord Morris of Borth-y-Gest in *Conway v Rimmer* [1968] AC 910 held that:
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> > '... though precedent is an indispensable foundation upon which to decide what is the law, there may be times when a departure from precedent is in the interests of justice and the proper development of the law. '
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> The courts, therefore, should not be obliged to continue to arrive at decisions which are both unjust to the citizens and inimical to the public well-being simply because of something decided centuries ago.

And on pp 239–240, Edgar Joseph Jr FCJ (as he then was) said:

> For myself, I believe that our view on the powers of the court in Judicial Review proceedings, although they constitute a departure from previous cases decided in this country to which I have referred, is a progressive one, and in giving effect to them we derive comfort from the famous words of Denning LJ (as he then was) in his dissenting judgement in the case of *Candler v Crane,*

A *Christmas & Co* [1951] 2 KB 164, regarded by lawyers, almost without exception, as a brilliant advancement of the law of negligent misstatement, vindicated triumphantly some twenty years later in the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465:

> 'This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v White*, *Parsely v Freeman* and *Donoghue v Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. *On the other side there were the bold spirits who were ready to follow it if justice so required.* It was fortunate for the common law that the progressive view prevailed. (Emphasis added.)'

The words of Lord Denning, although uttered in a different context, can in appropriate circumstances, serve as a guide, to a judge when an argument of novelty is put forward, as happened in the present case.

I am of the opinion that due to the present climate of industrial relation and economic growth in Malaysia this would be an appropriate occasion to consciously depart from the Indian case of *Express Newspapers (P) Ltd* which produced the offending principle decided almost 37 years ago on the ground that the need of society and social conditions obtainable here in Malaysia are totally different than that of India then. Moreover s 3 of the Civil Law Act 1956 provides that the common law of England and rules of equity shall be applied so far as only as circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary. In the Court of Appeal case of *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 at pp 309–310 Gopal Sri Ram JCA said:

> In our judgment, it would be quite wrong, and indeed wholly out of place, to decide a Malaysian case solely by reference to English or other Commonwealth decisions. Indeed, the more recent decisions of the English courts demonstrate that their concept of the doctrine and the relationships to which it may be extended do not accord to the standards of our society.
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> The views expressed in *O'Brien*'s case merely reflect the law's attempt to keep in tandem with the moral standards of the society in which an English court functions. Our society, on the other hand, has an entirely different set of moral standards. It would therefore be quite wrong to blindly follow all foreign decisions if the result would facilitate moral decadence within our social structure.
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> The right to modify principles of the common law and doctrines of equity that have their historical origins in England to suit domestic needs of another jurisdiction has been very recently recognized by the judicial committee of the Privy council in *Invercargill City Council v Hamlin*, Privy Council Appeal No 36 of 1995, yet unreported. It is an appeal from New Zealand. Speaking in quite a different context, Lord Lloyd of Berwick, when delivering the advice of the board, said:

> 'But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be 'yes'. The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.'

In conclusion I am of the view that there is a need today in Malaysia for the court to adopt a proactive stand in order to create a win-win situation for both employers and employees.The employers and the employees are the pillars of the country's economic and social developments. I think I am fortified by the following statements made by Justice GH Walters, Supreme Court of South Australia in a paper entitled '*Archaism in the Courts*' (see [1977] 2 MLJ lxxiv):

> Adherence to precedent is one of the fundamental conceptions of our legal system. Not infrequently, the first question a judge will ask himself when confronted with a case, especially in the field of civil law, is whether there is any previous decision capable of serving as a precedent, or, at least, an analogue for the case in hand. In this process, the judge searches for a major premise to govern the case before him; he may use all sorts of comparisons, analogies or distinctions in guiding him in the determination of the issues falling for decision. This exercise will no doubt be undertaken in the quest for certitude; and no less an authority than Viscount Simonds stressed 'the importance, ... the paramount importance of certainty of the law' (*Jacobs v London County Council* [1950] AC 361 at p 373)). But if I may respectfully say so, a stringent adherence to the doctrine of precedent, to innumerable earlier judicial utterances, tends to place less importance upon basic principle and to make the judge something of a legal historian, rather than a theoretical jurist expanding deductive legal principles consonant with the changes that fit existing social and economic circumstances and meet new situations. 'The more precedents there are, the less occasion is there for the law; that is to, the less occasion is there for investigating principles: (Boswell, *The Life of Samuel Johnston* (1906) Vol 1, p 416, cited by Lord Devlin at p 6).
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> As I see it, the dominant purpose of all precedents must be to subserve in the construction, enunciation, and application of legal principles. Even a searching analysis of precedents cannot always be an illumination for the future. If judges' decisions are made to depend upon cases decided in their own or other jurisdictions, may we not find ourselves landed in the situation of having 'a heap of unrelated instances which those come after may or may not find to be consistent with one another' (Sir Frederick Pollock, *Judicial Caution and Valour* (1929) 45 LQR 293 at p 296)). I ask, therefore, whether the stage has not been reached where judges 'sacrifice their sense of reason and justice upon the altar of the Golden Calf of precedent' (*Van Kleeck v Ramer* ((1916) 156 Pac 1108, per Scott J at p 1121); where, by application of our system of case law to the formulation of law acceptable to modern society, we make a lesser contribution to legal thinking and bind ourselves too rigidly to the fetters of the past.
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> But if the answer to the question I have just posed be — nay, then no matter how time-honured the concept of judicial precedent may be, it must not be blindly followed. Like all legal doctrines, it must be applied with an eye

A to justice. 'The common law would be sapped of its life blood if stare decisis were to become a god instead of a guide' (*Fox v Snow* ((1950) 76 A 2d 877, per Vanderbilt CJ at p 883)). Stare decisis must not become a fetish, for slavish adherence to precedent, when new conditions require new rules of conduct, can only bring the administration of justice into disrepute. 'Uniformity ceases to be good when it becomes uniformity of oppression' B (Justice Cardozo: the Nature of the Judicial Process (1921) at p 113).

Appeal allowed.

Reported by Jafisah Jaafar

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